

Comments to the Federal Election Commission

In the Matter of
Internet Communications Disclaimers and the Definition of “Public Communication”
Notice 2018-06
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Extensive Online Disclaimer Requirements Raise Serious First Amendment Concerns

The proliferation of online media has democratized the marketplace of ideas as quickly as an electron speeds down a wire. Unfortunately, our regulatory state still moves at an analog pace. The Commission should thus tread lightly in imposing strictures that will hamper innovation and clutter our screens with information that does little to actually inform the few who would even take the time to read it. The right of citizens to communicate the message of their choice is at the core of the freedom of speech. Any burden placed on it must intrude as little as possible.

The proposed Alternative A, in particular, has a face made for radio. It would impose “stand by your ad” requirements on all audio and video content and slap full-length disclaimers on everything else, with only limited accommodation for the plethora of formats that proliferate online. A full-page newspaper ad has room to inform the public in detail; the same cannot be said for a promoted tweet. Filling banner ads with boilerplate infringes the rights of citizens—both those who wish to speak, and those who wish to listen. Requiring that online media comport with rules designed for a world of newsprint and vacuum tubes makes about as much sense as requiring smartphones to use a rotary dialing mechanism.

The Supreme Court has long recognized the “vital relationship between freedom to associate and privacy in one’s associations.”² This does not mean that the requirement to include an informative disclaimer is never defensible.³ Such requirements must be tailored, however, to the narrow interest at issue, because “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association” as a direct curtailment of the right to speak itself.⁴

Disclaimer requirements must be no more burdensome than necessary, and even where a necessity exists they may not infringe on the core speech itself. As Justice William Brennan explained, “compelling the publication of detailed . . . information that would fill far more space than the advertisement itself would chill the publication of protected . . . speech and would be entirely out of proportion to the State’s legitimate interest in preventing potential deception.”⁵ While it can be useful for citizens to know the provenance of the messages they receive, “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend

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² *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

³ See *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

⁴ *NAACP*, 357 U.S. at 462.

⁵ *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 663–64 (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

upon the identity of its source.”⁶ To this end, the Court has held that bans on anonymous pamphleteering violate the First Amendment.⁷ If the citizens of Ohio can fairly consider a pamphlet without knowing its author, the rest of the country could do without ads cluttered with federally prescribed verbiage.

These concerns are particularly acute when dealing with new formats that cannot accommodate old standards. Even “a newspaper [cannot] proceed to infinite expansion of its column space to accommodate the [disclaimers] that a government agency determines or a statute commands the readers should have available.”⁸ If there are constitutionally recognized limits on what a newspaper can accommodate, Twitter and Pinterest face *a fortiori* constraints.

If all internet ads are to comport with the full battery of disclaimer requirements, the inevitable result would be that some forms of advertising would be entirely off limits to political communication. The Commission should not get into the business of making such judgments. The Supreme Court admonishes us that “any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts’ own lawful authority.”⁹ Administrative agencies are no less beholden to the First Amendment.

As it happens, the question of how far the government may burden speech with disclaimers is now pending before the Court. *NIFLA v. Becerra*¹⁰ concerns a California law that requires pro-life pregnancy centers to place a 29-word disclaimer on all advertising, in as many as 13 different languages. While there is some dispute as to how much speech is really covered, justices of every persuasion suggested at oral argument that a disclaimer requirement that ended up dominating the ad would fail constitutional muster. Justice Anthony Kennedy expressly declared such a requirement would be “and undue burden . . . that should suffice to invalidate the statute.”¹¹ Justice Ruth Bader Ginsburg likewise objected to the multilingual requirement as “very burdensome.”¹² Justice Sonia Sotomayor suggested that unless the provision was limited it would be “more burdensome and wrong.”¹³ Accordingly, the Commission should remain cognizant of the First Amendment issues attending overbearing disclaimers.

To the extent the Commission feels that guidance should be given, we would encourage it to consider the least restrictive means available, consistent with the right of free expression protected by our founding document. We have confidence that the American people can fairly assess the arguments presented in the marketplace of ideas; believe that drowning them in warnings and provisos will do more to the clutter up that marketplace than it will illuminate.

We would also welcome the opportunity to present these and further thoughts, including on specific regulatory proposals, at the Commission’s hearing on this matter.

Respectfully submitted,
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⁶ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

⁷ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

⁸ *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256–57 (1974).

⁹ *Citizens United*, 558 U.S. at 326 (2010).

¹⁰ *Nat’l Assoc. of Family & Life Advocates v. Becerra*, 16-1140.

¹¹ See *NIFLA*, Transcript of Oral Argument at 23.

¹² *Id.* at 57.

¹³ *Id.* at 62.